STATE OF VERMONT
DEPARTMENT OF LABOR

F. B. Opinion No. 29S-06WC

By: Margaret A. Mangan
Hearing Officer

v.

Visiting Nurses Association/
Liberty Mutual Insurance Group

For: Thomas W. Douse
Acting Commissioner

State File No. W-57205

RULING ON COSTS

Claimant, by and through her attorney, Christopher McVeigh, Esq., requests necessary costs for her success at hearing. See *Frances Bean v Visiting Nurses Association/Liberty Mutual*, Op. No. 29-06WC (July 7, 2006). Defendant's attorney, Eric Johnson, Esq., opposes the request.

At hearing, Claimant requested costs pursuant to 21 V.S.A §678(a). However, due to the lack of specificity, the Department was unable to determine if the costs were necessary to Claimant's success. The issue was deferred until the Department received a more detailed report or until agreement by the parties. Since the hearing, Claimant submitted an additional cost report as requested. In this filing she explained the entries for "postage" and "copies." She also listed expert witness costs. The defense argues that the postage and copy costs are excessive.

Claimant's costs were not exorbitant. Instead, I accept Claimant's postage and copy costs as necessary to her success. The Department makes this determination after review of her detailed report. As such, Claimant is awarded total costs of $1,199.60.

ORDER:

Accordingly, based on the foregoing reasons,

Claimant's request for costs of $1,199.60 is hereby GRANTED.

Dated at Montpelier, Vermont this 4th day of August 2006.

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Thomas W. Douse
Acting Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR

F. B.

v.

Visiting Nurses Association
Liberty Mutual Insurance Group

Opinion No. 29MS-06WC

By: Margaret A. Mangan
Hearing Officer

For: Patricia Moulton Powden
Commissioner

State File No. W-57205

RULING ON DEFENSE MOTION FOR STAY

Defendant, by and through its attorney, Eric A. Johnson, Esq., moves for stay of the order in favor of Claimant, Op. No. 29-06WC. Claimant, by and through her attorney, Christopher McVeigh, Esq., opposes the motion.

Defendant argues that it should have prevailed in its position that recommended fusion surgery for the Claimant was not related to her work related injury because Claimant had radicular problems that preexisted the work related injury. Accordingly, it argues that the order should be stayed.

Claimant argues that the judgment must stand because Claimant's preexisting problems did not limit her ability to work and did not lead to the need for surgery. Only after the work related injury did the symptoms escalate and surgery become necessary.

Although an appeal has been filed, the order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner. 21 V.S.A. § 675. To prevail on its request in the instant matter, Defendant must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

Defendant has not demonstrated that it is likely to succeed on the merits. Although its expert Dr. Backus presented a strong opinion, the Claimant's support was more persuasive at this Department. It is likely to be the same in court. Next, payment of surgery does not constitute irreparable harm to the defense. See *Frederick v. Georgia-Pacific Corp*., Op. No. 28S-97WC (1997). On the contrary, were the decision stayed, Claimant would incur the hardship of additional costs. Finally the best interests of the public are best served by adhering to the speedy resolution of workers' compensation claims and ordering prompt payment.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law, the motion for stay is hereby DENIED.

Dated at Montpelier, Vermont this 21st day of September 2006

_____
Patricia Moulton Powden
Commissioner

F. B. v. Visiting Nurses Association (July 7, 2006)

STATE OF VERMONT
DEPARTMENT OF LABOR

F. B.

v.

Visiting Nurses Association/
Liberty Mutual Insurance Group

Opinion No. 29-06WC

By: Margaret A. Mangan
Hearing Officer

For: Thomas W. Douse
Acting Commissioner

State File No. W-57205

Hearing held in Montpelier on February 28, 2006
Record closed on May 15, 2006

APPEARANCES:

Christopher J. McVeigh, Esq., for Claimant
Eric A. Johnson, Esq., for Defendant

ISSUES:

1. The nature of the review for a Form 27 Employer's Notice of Intention to Discontinue Benefits when an employer/carrier has accepted a claim.

2. Whether Claimant has a compensable work-related injury.

3. If so, whether the fusion surgery Dr. Monsey performed on October 21, 2005 is a reasonable medical treatment.

4. Whether Claimant is entitled to attorney's fees and costs in connection with this claim.

EXHIBITS:

Joint:	Medical Records
Claimant 1:	Deposition of Dr. Monsey
Claimant 2:	Deposition of Dr. Mahoney

FINDINGS OF FACT:

1. Claimant worked for the Visiting Nurses Association at the Vermont Respite House in Williston, Vermont from May of 2001 until January of 2005.

2. At all relevant times, Claimant was an employee and Visiting Nurses Association her employer, within the meaning of the Vermont Workers' Compensation Act.

3. Claimant's work duties as a caregiver while at the Vermont Respite House included lifting, moving, and feeding patients.

4. Before January of 2005, Claimant lost no time from work for any back or leg condition, although she had treated with a chiropractor on a monthly basis for some time.

5. Claimant's chiropractor, Dr. Sean Mahoney, primarily treated Claimant's cervical and thoracic spine, although he provided some treatment to her lumbar spine before January 30, 2005. Dr. Mahoney has had a treating relationship with Claimant for approximately eight years.

6. On January 30, 2005 while working at the Vermont Respite House on the night shift, Claimant was helping to turn a heavy patient when she felt pain in her low back. The pain also radiated down her left leg. This was unlike any pain she ever had before.

7. Claimant finished her shift. Before she left for home in the morning, she reported the incident to her supervisor.

8. A Physician's Assistant, Ms. Anderson, treated Claimant later that day at Occupational Health and Rehabilitation, Inc. The diagnosis was acute lumbar strain. Ms. Anderson noted Claimant's prior chiropractic care and that Claimant "was repositioning a resident with another house manager when she started developing gradual onset of left-sided lower back pain with left thigh pain as well. She states this as more gradual onset."[See Medical Records at 204].

9. Claimant has not worked since January 30, 2005. The claim was filed on February 7, 2005 and received by the Department on March 24, 2005.

10. At a visit with Ms. Anderson on February 3, 2005, it was noted that Claimant walked with an antalgic gait. Ms. Anderson then referred Claimant to see her chiropractor, Dr. Mahoney, for treatment.

11. Dr. Mahoney continued to treat Claimant. His treatment began to focus more on her legs and the lumbar region of her back instead of her cervical and thoracic spine. The frequency of the visits to Dr. Mahoney increased from bimonthly visits to seventy-seven times between February and September of 2005. Claimant's relief from the back and leg pain was temporary.

12. Dr. Karen Burke, Claimant's primary care physician, was aware that Claimant had back pain prior to the 2005 injury. She noted that Claimant had "back pain, probably due to arthritis." [See Medical records at 226]. After the 2005 injury, Dr. Burke was concerned for Claimant's back and bilateral leg pain and her difficulty with walking. She referred Claimant to Dr. Tramner.

13. The parties entered into a Form 21 Agreement for Temporary Total Disability Compensation for an injury to the back, an agreement approved by this Department on April 24, 2005.

14. Dr. Bruce Tramner, a neurosurgeon at Fletcher Allen Health Care, treated Claimant on May 3, 2005. According to a July 5, 2005 letter, Dr. Tranmer wrote that Claimant continued to complain of back pain with additional pain that traveled down the backs of her legs bilaterally, into her feet, and then into the medial toes. After reviewing the MRI scan, Dr. Tramner noted the presence of multilevel degenerative disc disease and osteoarthritis. He was unable to state the cause of Claimant's pain. He then referred her to Dr. Monsey. Dr. Tramner also referred Claimant to Dr. Tandan to determine if Claimant had a muscular disease.

15. On July 15, 2005, Dr. Verne Backus, Occupational Health Specialist, performed an independent medical examination (IME) on Claimant at the request of Liberty Mutual, the carrier at risk for Visiting Nurses Association. Dr. Backus concluded that Claimant's diagnosis of spinal degeneration is not causally related to the injury she sustained at work.

16. Defendant relied on the results of the IME by Dr. Backus that Claimant had reached medical end result and that work did not cause her current condition. Defendant then filed a Form 27 Employers Notice of Intention to Discontinue on August 25, 2005. The Form 27 became effective on September 1, 2005.

17. Also, on August 25, 2005, the carrier denied the claim for back/leg sprain as unrelated to an occupational injury.

18. Even though benefits were no longer available, Claimant sought treatment from Dr. Robert Monsey, an Orthopedic Spinal Surgeon, on August 29, 2005.

19. Dr. Monsey reviewed Claimant's history, medical records, and MRI's. Claimant did not disclose that she had back pain before the 2005 injury. Instead, Dr. Monsey received this information from Claimant's intake form and her permanent problem list.

20. Dr. Monsey noted that the MRI's revealed spinal degeneration, but he found that Claimant had suffered from injury to her disc. This injury, not the spinal degeneration,

was the cause of her current back and leg pain. He concluded that Claimant should undergo fusion surgery in order to alleviate the pain.

21. On August 30, 2005, Dr Rup Tandan, a neurologist, concluded that Claimant did not have a muscular disease. He noted that she did have muscle weakness in her legs that caused difficulty with walking.

22. In October of 2005, Dr. Monsey performed fusion surgery of her spine at the L3-4, L4-5 disc levels.

23. Subjectively, Claimant's lower back pain has improved after fusion surgery, thus allowing her to engage in activities of daily living such as driving and grocery shopping.

Medical Opinions

24. Dr. Sean Mahoney, Chiropractic Physician and Claimant's treating chiropractor of eight years, testified that Claimant had received bimonthly treatment for her lower back before the 2005 injury. Prior to this point, she was fully capable of performing her work duties as a caregiver and was able to engage in her ordinary routines. However, the frequency of Claimant's visits rapidly increased after the 2005 work-related incident. Her symptoms were much more severe than before and her ability to physically function was impaired. She was unable to return to work. Claimant also experienced difficulty with performing many ordinary activities. Because of this dramatic change in her condition, he suspected lumbar disc involvement as the cause of her pain.

25. Dr. Verne Backus, Occupational Health Specialist, conducted the independent medical examination of Claimant on July 15, 2005. Dr. Backus noted that the diagnosis was "multi-level lumbar spondylosis and degenerative disc disease with left leg radiculopathy." [See Medical Records 19]. He concluded, to a reasonable degree of medical certainty, that this diagnosis was not causally related to Claimant's work injury for several reasons. First, he noted that the description of Claimant's injury varied. Dr. Anderson wrote that the pain was a gradual onset, whereas Dr. Mahoney and other providers noted a sudden onset of pain. An injury of sudden onset, rather than one of gradual onset, would be more likely to support a finding of causation. Dr. Backus also found that Claimant was hesitant to disclose that she had back pain prior to the 2005 injury. Furthermore, Dr. Backus read that the MRI's revealed a chronic condition, such as degenerative disc disease. If Claimant did have any symptoms from work it was temporary and did not change the course of her progressive disease. Thus, taking all of these factors into consideration, Dr. Backus concluded that it was within a reasonable degree of medical certainty that her injury was not work-related and that she did not aggravate a preexisting condition. He also found that she only had a part-time work capacity that did not involve the moving or transferring of patients.

26. Dr. Robert Monsey, Orthopedic Spine Surgeon at Fletcher Allen, opined that the fusion surgery he performed was causally related to Claimant's work injury of January 30, 2005. He stated that it is not unusual for Claimant to have had back pain prior to her 2005 injury. He testified that eighty percent of the population experiences back pain at some point in their life. Furthermore, the type of pain she experienced after the work injury was a deep low lumbosacral discomfort/pain associated with radiation into her extremity and a radicular distribution. These particular areas can be distinguished from the back spasms and minimal aching in her lower back that she had experienced prior to her work injury. The left knee pain that Claimant had before 2005 was most likely caused by arthritis. Also, the muscle weakness in Claimant's legs was probably related to the medical treatment of her exposure to an infectious disease. Finally, Dr. Monsey disagreed with Dr. Tranmer's reading of Claimant's MRI's. Dr. Monsey opined that the MRI's revealed radiographic findings of spinal degeneration as well as radiographic findings of an injury that correlated with Claimant's symptoms. Accordingly, Dr. Monsey concluded that Claimant had a work-related injury and the fusion surgery would alleviate, or at least lessen, Claimant's back and leg pain.

CONCLUSIONS OF LAW:

Standard of Review of Form 27

1. Before this issue can be addressed, it is helpful to review the Department's administrative procedures. There are two levels of process, informal and formal, that may be necessary for a claimant to pursue a workers' compensation claim.

2. At the outset, the claimant has the burden of establishing all facts essential to the rights asserted in this workers' compensation case. *Goodwin v. Fairbanks*, 123 Vt. 161 (1962).

3. Once a claim is filed, by the employer on a Form 1 or employee on a Form 5, the carrier/employer shall have twenty-one days to accept or deny the claimant's workers' compensation claim. See WC Rule 3.0900. In this case, a First report of Injury was filed on February 2, 2005. No denial was filed.

4. In fact, the carrier accepted the claim. The Form 21 Agreement for Temporary Total Disability Compensation was signed by Claimant and the insurance adjuster and approved by a specialist in this Department. With that agreement, Claimant met her burden to prove the compensability of a back injury under *Goodwin*.

5. Generally, if a carrier has accepted a claim or is under an interim order to pay benefits, it must file a Form 27 before terminating those benefits, a form that is reviewed by a specialist at the informal level.

6. The Vermont legislature enacted 21 V.S.A. §643a to address the defendant's burden of proof at the informal level with regard to the Form 27. This statute provides that the commissioner, upon the initial review of the Form 27, may order a continuance of benefits to Claimant until a hearing is held if the evidence does not "*reasonably support*" the termination. *Id*. (emphasis added). '"Evidence that reasonably supports an action' means, for the purposes of section 643a …relevant evidence that a reasonable mind might accept as adequate to support a conclusion that must be based on the record as a whole, and take into account whatever in the record fairly detracts from its weight." § 601(24).

7. Pursuant to its rule-making authority, the Department promulgated WC Rule 18.1100 to expand on the standard of review for a Form 27 at the informal level: "Unless the claimant has successfully returned to work, temporary disability compensation shall not be terminated until a Notice of Intention to Discontinue Payments (Form 27), *adequately supported by evidence*, is received by both the commissioner and the claimant." (emphasis added). The same standard applies to the termination of medical benefits. See WC Rule 18.1200.

8. Acceptance of the Form 27 means that reasonable mind concluded that Dr. Backus's opinion was the persuasive one, taking into account the other evidence.

9. At formal hearing, Defendant now has the burden of supporting its claim for termination by a *preponderance of the evidence, Merrill v University of Vermont*, 133 Vt. 101, 105 (1974) (emphasis added), even though the Form 27 was accepted.

10. In sum, when the Department's specialists initially review the Form 27, Defendant's evidence must reasonably support its termination of benefits. V.S.A.§ 643a; WC Rule 18.1200. Yet the Department has repeatedly recognized that during a formal hearing, a Defendant's termination of benefits must be justified by a preponderance of the evidence. See, e.g., *Linda Weeks v. N.S.A. Industries,* Opinion No. 27-05WC (2005); *Joy Alexander v Middlebury College,* Opinion No. 16-05WC (2005); *Anne Britton v Laidlaw Transit*, Opinion No. 47-03WC (2004).

11. Therefore, Defendant must prove that its justification for the termination of benefits was *more likely than not* true.

Causation

12. In workers' compensation cases, where the causal connection between an accident and an injury is obscure and a layperson would have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*., 137 Vt. 393 (1979).

13. Therefore, Defendant, the party bearing the burden of proof must support its position with medical evidence and prove that its position is the more probable hypothesis.

14. While a reasonable degree of medical certainty might connote some marginally higher standard of proof than a mere preponderance, the modifier "reasonable" returns the standard to the level of preponderance [more likely than not]. *Wheeler v. Central Vermont Medical Center,* 155 Vt. 85, 94 (1990).

15. To address divergent opposing medical opinions, the Department considers the following criteria: 1) The nature of treatment and length of time there has been a patient-provider relationship; 2) whether all accident, medical, and treatment records were made available to and considered by the examining physician; 3) whether the report or evaluation at issue is clear and thorough and includes objective support for the opinions expressed; 4) the comprehensiveness of the examination; and 5) the qualifications of the experts, including professional training and experience. *Wallace v. Velan Valve Corp.*, Opinion No. 51-02WC (2002); *Yee v. IBM*, Opinion No. 38-00WC (2000); *Miller v. Cornwall Orchards,* Opinion No. 20-97WC (1997); *Martin v. Bennington Potters,* Opinion No. 42-97WC (1997); *see also*, *Morrow v. VT Financial Services,* Opinion No. 50-98WC (1998).

16. Claimant relies on the testimony of a chiropractic physician, Dr. Mahoney, and an orthopedic spine surgeon, Dr. Monsey, to establish a causal connection. Defendant relies on the IME performed by Dr. Backus, an occupational medicine specialist, to support that there is no causal connection.

17. In this case, a thorough analysis reveals that the factors weigh in Claimant's favor. This would be the case even if Claimant bore the burden of proof.

18. Dr. Mahoney has had a treating relationship as Claimant's chiropractor for eight years. Dr. Monsey has had a treating relationship as Claimant's surgeon for almost a year, whereas Dr. Backus has only examined her once. All three experts reviewed the relevant records, took complete histories, and then provided objective opinions. All physicians are well qualified to render opinions in this case, Dr. Mahoney with his expertise as a chiropractor, Dr. Monsey in the area spinal surgery, and Dr. Backus in occupational health. However, Dr. Monsey has an advantage in the area of education as a surgeon. Therefore, the advantage is in favor of the Claimant's experts by the first criterion and fifth criterion.

19. Not only does the balance tip in favor of Claimant's experts, but Dr. Backus's opinion is not convincing. First, he opined that there was no causal connection because Dr. Anderson had noted that Claimant's injury was a gradual onset, instead of a sudden onset. However, Claimant reported these symptoms the same morning the injury occurred. It appears not that Claimant's injury was a gradual onset, but that her symptoms had gradually worsened throughout the morning. Also, Dr. Backus concluded that Claimant had failed to disclose her prior back pain to others, including Dr. Monsey. However, Dr. Monsey had this information before surgery from Claimant's intake form and her permanent problem list. Finally, Dr. Backus read the MRI's differently than Dr. Monsey. Dr. Backus opined that the MRI's revealed spinal degeneration as the sole cause. Dr. Monsey read that the MRI's indicated both spinal degeneration and an injury as a cause. Such differences in opinion are not controlling in this case, especially given the success of Claimant's surgery by Dr. Monsey.

20. When all the evidence is considered as a whole, the more probable hypothesis is that Claimant's injury is work-related and compensable. The basis for the Form 27 is therefore rejected.

Reasonableness of Fusion Surgery

21. The Vermont Workers' Compensation Act requires that the employer/carrier pay for all reasonable medical care and treatment causally related to a work injury. 21 V.S.A. § 640(a).

22. Whether the proposed treatment is reasonable depends, not on the subjective desire of the claimant, but on the likelihood it will improve a work-related condition or symptoms. *Quinn v. Emery Worldwide*, Opinion No. 29-00WC (2000). It is what is shown by competent expert evidence to be reasonable to relieve a claimant's symptoms and maintain functional abilities. *Britton v. Laidlaw Transit,* Opinion No. 47-03WC (2003).

23. Claimant's surgical procedure was reasonable and causally connected to her work injury at the Respite House.

24. Defendant argues that the surgical procedure should not be compensable because her injury is not causally related to her employment with Visiting Nurses Association.

25. However, as discussed above, Claimant's injury is work-related, consequently it is compensable. I defer to Dr. Monsey's opinion, as Claimant's spinal surgeon, that it was necessary for Claimant to undergo the fusion surgery. It is evident that the surgery was reasonable given the result. In 2005, Claimant experienced a severe decrease in her ability to maintain her active life, both at work and at home. Dr. Monsey recommended and performed surgery. Thereafter, she became more able to engage in ordinary activities, such as driving and grocery shopping. It was a reasonable surgery because it improved the symptoms that flowed from Claimant's work injury.

26. In conclusion, the proposed surgery is compensable because it is causally connected to Claimant's work-related injury and is reasonable under 21 V.S.A. § 640(a).

Attorney's Fees

27. A prevailing claimant, Frances Bean is entitled to reasonable attorney's fees as a matter of discretion and necessary costs as a matter of law when the claim is supported by a fee agreement and details of costs incurred and work performed. 21. V.S.A. §678(a); WC Rule 10.000.

28. Factors considered in fashioning an award include the necessity of representation, difficulty of issues presented, time and effort expended, clarity of time reports, agreement with the claimant, skill of counsel and whether fees are proportional to the efforts of counsel. See *Hojohn v. Howard Johnson's, Inc.*, Op. No. 43A-04WC (2004); *Estate of* Lyons *v. American Flatbread,* Op. No. 36A-03 (2003).

29. Claimant's success in this case was due to the efforts of her attorney who needed to spend 102 hours because of the carrier's denial, difficulty and number of the issues presented, and discovery involved. Claimant has submitted sufficient proof of time expended. Since Claimant has prevailed on all issues, I do not need to address concerns about the appropriate fee with a partial success. Also, the award does extend to time spent in preparation of litigation, such as a phone consultation with an expert. See *Antonio Sanz v. Douglas Collins*, Op. No. 15R-05WC (2005). Here the attorney's time in the case preparation and presentation in the amount of 102 hours is reasonable.

30. Claimant is entitled to necessary costs in this case, however she has failed to specify her claimed costs. The entries of "postage" and "copies" are insufficient. The Department has no basis on which to determine if the costs are in fact necessary to this case. Instead, Claimant must explain to what each of the entries relates, i.e., "postage to the Department re proposed findings of fact/conclusions." Thus, the issue of costs will be deferred for 30 days until Claimant submits a detailed cost report, or until agreement by the parties.

31. I do not accept Defendant's argument that paper copies are not a legitimate cost. Defendant contends that the copies made by the defense should cancel out the copies made by Claimant's attorney. If this were true, the costs of deposing expert witnesses would be cancelled out as well.

32. Thus, Claimant is awarded fees of $9,180.00 (102 hours at $ 90.00 per hour). Claimant is also awarded interest on payments from September 1, 2005 until benefits are paid. 21 V.S.A § 664. The issue of costs for $1,190.12 is deferred for 30 days until Claimant submits a more detailed report, or until agreement by the parties.

ORDER:

Therefore, based on the foregoing findings of fact and conclusions of law,

1. Defendant is hereby ORDERED to pay Claimant's reasonable and necessary medical expenses related to her compensable injuries, including all costs associated with the surgical procedure.

2. Defendant is hereby ORDERED to pay from September 1, 2005 and to continue paying Claimant temporary total benefits pursuant to 21 V.S.A. § 642, until such compensation may be terminated in accordance with Workers' Compensation Rule 18.

3. The claim for attorney's fees of $9,180.00 is hereby GRANTED.

4. The claim for costs of $1,190.12 is hereby DEFERRED for 30 days until Claimant submits a more detailed explanation, or until agreement by the parties.

5. Defendant is hereby ORDERED to pay interest at the statutory rate computed from the date when the payments were terminated, September 1, 2005, and until the date of payment. 21 V.S.A § 664.

Dated at Montpelier, Vermont this 7th day of July 2006

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Thomas W. Douse
Acting Commissioner